

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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| In the Matter of                           | ) |                   |
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| Nondiscrimination in the Distribution of   | ) | CS Docket No.01-7 |
| Interactive Television Services Over Cable | ) |                   |
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**REPLY COMMENTS OF THE OFFICE OF COMMISSIONER OF BASEBALL**

The Office of the Commissioner of Baseball (“Baseball”) submits the following Reply Comments in response to the Notice of Inquiry issued by the Federal Communication Commission (the “Commission”) concerning “Nondiscrimination in the Distribution of Interactive Television Services Over Cable” (the “Notice”).

**I. INTRODUCTION AND SUMMARY**

Baseball has reviewed the various comments submitted by parties that are or may be involved in the delivery of interactive television (“iTV”) services. Those comments set forth a variety of positions, ranging from the National Cable Television Association’s (“NCTA”) lengthy comments advocating that the Commission refrain from rulemaking at this time, to the comments of the National Association of Broadcasters, which recommends the initiation of a rulemaking to establish non-discrimination rules for providing iTV access.

With a few exceptions – notably the comments of the National Football League and the Non-MVPD Owned Programming Networks – these comments make no reference to the rights of content owners to control the dissemination of their intellectual

property and the right to limit the dissemination of data or other content in conjunction with that intellectual property. The protections afforded by the Copyright Act and the trademark and unfair competition laws, however, will play a central role in the development of the market for iTV services. The Commission should recognize the valuable rights granted by Congress to content owners, and should avoid any regulations that would diminish those rights in any way.

With regard to the substance of the Commission's inquiry into whether it would be advisable to promulgate rules with regard to the provision of iTV services, Baseball firmly believes that market solutions are favorable to government regulations, especially in a market as nascent as that for iTV services. In a marketplace free from governmental influence the providers of conventional television programming content, iTV services, and distributors can reach negotiated solutions that will benefit all involved, rather than just those favored by regulation. Such negotiated solutions will inevitably produce the quality and quantity of iTV services that consumers will demand.

## **II. BACKGROUND**

Baseball is one of the leading providers of sports programming in the United States today. Individual Major League teams, playing in the American and National Leagues, own the copyrights in the telecasts of their team's regular season games. Baseball owns the copyrights in the telecasts of the All-Star Game and playoff and World Series games. These telecasts are broadcast over the air locally and nationally, transmitted by cable television networks, and beamed by satellite carriers to television viewers all over the United States. In addition, Baseball owns the content created by MLB Productions, the in-house television, video, film, and production division of

Baseball. Indeed, MLB Productions was recently honored with an Emmy nomination for producing the program “Baseball: Latino Passion,” which aired nationally on NBC. *See* [www.mlb.com/NASApp/mlb/mlb/news/mlb\\_news\\_story.jsp?article\\_id=mlb\\_20010322\\_emmy\\_pr&team\\_id=mlb](http://www.mlb.com/NASApp/mlb/mlb/news/mlb_news_story.jsp?article_id=mlb_20010322_emmy_pr&team_id=mlb) (press release).

Neither Baseball nor individual Major League teams distribute their copyrighted telecasts themselves. Rather, Baseball contracts with broadcast networks and cable networks for the broadcast of games nationally and individual Major League teams retain the ability to sell local broadcast rights. Additionally, Baseball has contracted with DirecTV, a leading DBS service, to provide a national, out-of-market broadcast package (called “Extra Innings”) on an exclusive basis. Accordingly, Baseball has had experience contracting for distribution of its content with programming networks, broadcasters, and multichannel video programming distributors.

Baseball has also entered the market for providing interactive services to consumers. In this regard, Baseball has formed MLB Advanced Media, LP (MLBAM), which is Baseball’s interactive media and Internet company. MLBAM provides fans with interactive content at Baseball’s official World Wide Web site, [www.mlb.com](http://www.mlb.com). Currently, Baseball does not provide iTV content as a part of game telecasts.

### **III. DISCUSSION**

#### **A. In Considering The Questions Raised By The Notice, The Commission Should Recognize The Rights Enjoyed By Content Owners Under The Intellectual Property Laws And Avoid Issuing Regulations Diminishing Those Rights**

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In considering whether a rulemaking is appropriate, the Commission should recognize that content owners such as Baseball have statutorily created intellectual property rights that protect the content owners from unauthorized uses of their content.

The intellectual property laws themselves are intended to foster the creation of content by allowing creators the exclusive rights to exploit their intellectual property. These laws have been enormously successful in promoting the creation of content; nearly \$450 billion of America's GDP each year is attributable to copyright industries in particular. See <http://www.senate.gov/~judiciary/pjl040301h.htm> (statement of Senator Leahy citing study by Economics, Incorporated). As such, among all the possible legal regimes that could be put into place to govern iTV services, it is the *existing* regime of copyright and trademark protection that is most likely to spur the development of exciting iTV content and services. Accordingly, the Commission should be careful to restrict any rulemaking so as to avoid diminishing the rights provided by the intellectual property laws.

**1. The Owners Of Copyrighted Television Programming Content Have The Exclusive Right To Prepare iTV Services That Constitute Derivative Works**

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Among the intellectual property laws, the Copyright Act provides content owners with some of the most important protections, which must be recognized by the Commission in the iTV context. The Copyright Act provides content owners such as Baseball with several exclusive rights to exploit their content, including the right to make derivative works of the copyrighted content. See 17 U.S.C. § 106(2) (granting copyright owners the exclusive right to prepare derivative works). Some of the iTV services described in the Commission's Notice would be categorized as derivative works, and accordingly the creation of those services would fall within the exclusive rights of the content owner.

The Copyright Act defines a derivative work as

a work based upon one or more preexisting works, such as translation, musical arrangement, dramatization,

fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101 (definition of “derivative work”). As such, an iTV service that consists of creating “annotations,” “elaborations,” or other modifications of copyrighted programming content must be considered as one that prepares “derivative works.” The iTV service provider would need a license from the owner of the copyrighted content before making that iTV service available. *See* 17 U.S.C. § 501 (providing a cause of action against those who violate any of a copyright owner’s exclusive rights).

Some of the iTV services contemplated explicitly or implicitly by the Notice would likely involve the creation of derivative works. For example, should a cable system operate an iTV service that provided statistical information regarding the players and teams participating in a particular telecast of a baseball game – “annotations” or “elaborations” on the copyrighted telecast – such an iTV service would likely be creating derivative works. Absent a license, the cable system would be infringing on Baseball’s copyrights. *See* 17 U.S.C. §§ 101, 106(2). Similarly, should an iTV service provider offer alternative camera angles to a National Football League game, that iTV service might be considered a “modification” of the copyrighted game telecast, thus creating a derivative work. *See id.* Similarly, the refusal to carry or deletion of an iTV signal from a content provider might constitute infringement as well. *See WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7<sup>th</sup> Cir. 1982) (holding that defendant’s truncation of a telecast constituted infringement). These examples are not meant to be exhaustive of the kinds of iTV services that might invade the exclusive rights

of copyright owners, but are indicative of the fact that iTV services will unquestionably raise issues governed by the intellectual property laws.

In embarking on any rulemaking, the Commission should therefore take into account the effect of any rules on the valuable intellectual property rights afforded to content owners. While the principle of nondiscrimination may be a noble one, the implementation of that principle in the form of regulations can unintentionally limit the ability of content owners to control their copyrighted content. Thus, a regulation imposing nondiscrimination regulations on iTV service providers might affect content owners' rights to make exclusive arrangements for the distribution of iTV content. Such exclusivity is guaranteed by the Copyright Act, and often forms the most valuable component of a content owner's rights. Accordingly, any regulations with regard to the provision of iTV services must account for the exclusive and valuable copyrights afforded to content owners.

**2. Certain iTV Services Contemplated By The Commission  
Would Constitute Violations Of The Lanham Act Unless  
Licensed By Content Owners**

In addition to the copyrights that may be infringed by the creation of iTV services, certain iTV services contemplated in the Notice would constitute trademark infringement and unfair competition under the Lanham Act if not properly licensed by content owners. The Notice posited that "on-line kiosk for purchasing licensed merchandise" would be one example of an iTV service. *See* Notice at 3. Another example might be an iTV service that recommended books on topics related to a telecast. In such a service, someone watching a Chicago Cubs game might be offered to buy baseball cards via an iTV enhancement. *See* Notice at 6 (¶ 15). Application of current

trademark and unfair competition laws would render such iTV services (aptly described as “t-commerce” by the Commission) illegal unless licensed by the content owner – even if the *merchandise* sold by the iTV service was originally licensed by the content owner.

The Lanham Act gives intellectual property owners the right to prevent others from using their marks directly or indirectly in such a way that creates confusion among consumers as to the source or origin of products or services. *See* 15 U.S.C. § 1125(a)(1)(A) (Section 43(a) of the Lanham Act). In the context of iTV “t-commerce” services, consumer confusion may result, among other ways, from a perceived “implied endorsement” of the products or services sold based on the connection between the iTV content and the programming content. *See, e.g., Oliveira v. Frito-Lay, Inc.*, 43 U.S.P.Q.2d 1455 (S.D.N.Y. 1997) (holding that defendant’s use of plaintiff’s voice in advertising could create a likelihood of confusion as to whether the plaintiff endorsed the products advertised); *Allen v. National Video, Inc.*, 610 F. Supp. 612, 626 (S.D.N.Y. 1985) (holding that use of a celebrity look-alike in advertisements raised the likelihood of confusion among consumers as to whether the celebrity endorsed the products advertised). Using the previous example, viewers of a Chicago Cubs game might be led to believe that the baseball cards being sold are endorsed by or recommended by Baseball or the Chicago Cubs as a result of their inclusion in an iTV in-game “t-commerce” service.

Such implied endorsements and other acts of unfair competition would endanger Baseball’s established rights. Baseball, like many other sports and content owners, is restrictive in its endorsements of particular products and services (e.g., making a product the “official” product of Major League Baseball). A selective and restrictive

endorsement policy affords Baseball the opportunity to be associated with only the best products and on a limited basis, making Baseball's endorsement more valuable.

Baseball, like other content owners, would likely be just as restrictive in allowing iTV t-commerce to proceed in conjunction with its content. Accordingly, should the Commission involve itself in a rulemaking that touches upon iTV t-commerce issues, it should bear in mind that content owners have the right and the need to limit and restrict the iTV t-commerce that take places in conjunction with their content. The Commission should not enact broad-based non-discrimination rules that allow iTV services to make t-commerce available to customers without the need to come to an agreement with content owners.

**B. Content Owners Should Be Able To Make Their iTV Content Available In The Market Free From Governmental Regulation**

As a fundamental principle, content owners should be able to make their iTV content available in the market free from governmental regulation. Given the infancy of the market for iTV services and platforms, it would be unwise for the Commission to engage in regulation that would affect the market for iTV services and platforms. Instead, content owners and other participants in the iTV market should be able to exploit freely their investments in their intellectual property, distribution networks, or technology platforms until some market failure actually develops.

The various comments submitted in response to the Notice have discussed at length whether regulation is necessary during the nascent stages of the market for iTV services and platforms. Baseball knows from experience that government regulation is not as effective as the marketplace for protecting content owners' rights and increasing the amount of content available to consumers.



Baseball, like other content owners, is subject to several limitations on the exercise of its exclusive rights. Cable systems and satellite carriers currently have access to Baseball's valuable broadcast content as a result of government intervention through the statutory compulsory license to retransmit broadcast signals to cable and DBS subscribers. *See* 17 U.S.C. §§ 111, 119. The compulsory licenses have been inferior to the market in terms of providing satisfactory return to content owners and the amount of content that is available to consumers. Among other things, the compulsory license fees pale in comparison to what content owners like Baseball are able to earn in the free market. Put simply, governmental regulation is no match for the free market in providing content owners fair compensation and providing consumers with greater access to the content they desire.

#### **IV. CONCLUSION**

The Commission should not regulate the market for iTV services and platforms at this time. The free market will provide consumers with greater iTV content and content owners with fairer compensation for their content. If the Commission does decide to regulate iTV services and platforms, it should avoid regulations which have an effect on the intellectual property rights granted by Congress to content owners.

OFFICE OF THE COMMISSIONER OF BASEBALL

By:

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Robert Alan Garrett  
Christopher Winters  
ARNOLD & PORTER  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
(202) 942-5000  
(202) 942-5999 (fax)

Of Counsel:

Thomas J. Ostertag  
OFFICE OF THE COMMISSIONER  
OF BASEBALL  
245 Park Avenue  
New York, N.Y. 10167  
(212) 931-7800  
(212) 949-5653 (fax)